

ANNOUNCEMENT

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NOTES

THE INCONTESTABLE CLAUSE IN THE LIFE INSURANCE POLICY—There has been a growing tendency in recent years toward liberalization of the life insurance contract,¹ and with this, the incontestable clause has grown in importance. Most powerful of the reasons for such a movement is doubtless the desire of beneficiaries, creditors, and policyholders for certainty of the insurer's liability. The presence of an incontestability provision protects the beneficiary in that it makes certain the payment to him by the company when the insured has died. Many years often elapse between the date of the policy's inception and the time of the insured's passing. The memory of man is short, and the lapse of a long period of time makes it hard for the true facts attending the writing of the policy to be ascertained. The insured himself, and probably many of the witnesses, are unavailable, and an excellent opportunity is afforded a dishonest or quibbling insurer to avoid payment. The incontestable clause, an agreement by the insurer that upon the happening of a certain event or the passage of a certain length of time it will not contest liability on the policy for any reason not obviously or specifically excepted, gives the beneficiary assurance that he may rely on the insurance protection without fear of intervening lawsuits or inability to recover because of facts which took place long in the past, and of which he had no knowledge. The creditors of the insured are likewise assured that their "collateral" is not subject to sudden disappearance, and the efficiency of the institution of life insurance in its credit function is thus greatly increased. Finally, the insured himself is not troubled by doubts as to whether his beneficiaries will collect promptly or at all. While these factors have made the incontestable clause a vital element of the life insurance contract from the purchaser's point of view, it must be remembered that the clause redounds to the benefit of the insurer in enabling it to offer a more readily acceptable contract to the purchaser.

The Validity of the Clause

Although the incontestable clause has, either by statute or economic necessity, become a universal provision, as yet it by no means enjoys uniform interpretation by the courts. Clauses differ in wording, and the factual situations to which they may apply are almost countless, but these factors do not account for all the discrepancies in the judicial interpretation.

¹ See AMRHEIN, *THE LIBERALIZATION OF THE LIFE INSURANCE CONTRACT* (1933).

Where the policy is stated to be incontestable after a certain time, usually one or two years, the clauses have invariably been held valid and enforceable, and not contrary to public policy, even when they exclude as a defense the insured's fraud in the inception of the policy.² They are construed not to promote fraud,³ nor to condone it,⁴ so long as a reasonable time⁵ is allowed the company for discovery. Where the policy is by its terms incontestable from date and fraud is excepted from the operation of the provision, the clause is valid and binding upon the insurer,⁶ but where the clause is silent as to fraud, the cases follow two theories. Some courts, unwilling to allow the insured a policy incontestable from date when obtained fraudulently, imply or read into the clause the exception of fraud, though they hold that other defenses are barred.⁷ But the majority of the courts which have faced this issue have held that the clause covers fraud, is valid, and is not contrary to public policy.⁸

The clause is often described, inaccurately, as it is self-imposed, as a short statute of limitations,⁹ or more properly as a provision recognizing the possibility of fraud but limiting the time within which the insurer may object.¹⁰ But whenever it has been attacked as in conflict with statutes prohibiting agreements to shorten the *Statute of Limitations*,¹¹ or prohibiting stipulations to exempt anyone from responsibility for his own fraud,¹² it has always been upheld on the ground that it is merely a waiver of the insured's right to use a particular defense. A more frequent cause for questioning the validity and effect of the clause arises when the policy provision differs from the statutory clause. The rule followed is that the insurer may validly contract to restrict himself to a greater degree than

² *Priest v. Kansas City L. Ins. Co.*, 119 Kan. 23, 237 Pac. 938 (1925); *Murray v. State M. L. Ins. Co.*, 22 R. I. 524, 48 Atl. 800 (1901); *Harrison v. Provident Relief Ass'n*, 141 Va. 659, 126 S. E. 696 (1925).

³ *American Nat. Ins. Co. v. Briggs*, 156 S. W. 909 (Tex. Civ. App. 1913).

⁴ *Powell v. Mutual L. Ins. Co.*, 313 Ill. 161, 144 N. E. 825 (1924); *Stratton v. Service L. Ins. Co.*, 117 Neb. 685, 222 N. W. 332 (1928); *Metropolitan L. Ins. Co. v. Peeler*, 71 Okla. 238, 176 Pac. 939 (1918); *Lawler v. Home L. Ins. Co.*, 59 Pa. Super. 409 (1915).

⁵ Two years: *Powell v. Mutual L. Ins. Co.*, *supra* note 4; *Link v. Mutual L. Ins. Co.*, 234 Ill. App. 250 (1924); *Kansas Mut. L. Ins. Co. v. Whitehead*, 123 Ky. 21, 93 S. W. 609 (1906); *Killian v. Metropolitan L. Ins. Co.*, 251 N. Y. 44, 166 N. E. 798 (1929). One year: *Great Southern L. Ins. Co. v. Russ*, 14 F. (2d) 27 (C. C. A. 8th, 1926); *Missouri St. L. Ins. Co. v. Cranford*, 161 Ark. 602, 257 S. W. 66 (1923); *Dibble v. Reliance L. Ins. Co.*, 170 Cal. 199, 149 Pac. 171 (1915); *Ramsay v. Old Colony L. Ins. Co.*, 297 Ill. 592, 131 N. E. 108 (1921); *Harris v. Security L. Ins. Co.*, 248 Mo. 304, 154 S. W. 68 (1913); *Reliance L. Ins. Co. v. Thayer*, 84 Okla. 238, 203 Pac. 190 (1922); *Kansas L. Ins. Co. v. Truscott*, 47 S. W. (2d) 675 (Tex. Civ. App. 1932).

⁶ *Independent L. Ins. Co. v. Carroll*, 222 Ala. 34, 130 So. 402 (1930); *Peoria Life Ass'n v. Hines*, 132 Ill. App. 642 (1907).

⁷ The law will impliedly except fraud as a defense. *New York L. Ins. Co. v. Weaver*, 114 Ky. 295, 70 S. W. 628 (1902); *Reagan v. Union M. L. Ins. Co.*, 189 Mass. 555, 76 N. E. 217 (1905). In *Welch v. Union Central L. Ins. Co.*, 108 Iowa 224, 78 N. W. 853 (1899), the court held that the answers in the insured's application would be given no effect if fraud as a defense were barred. It would seem, therefore, that the parties intended to except fraud from the clause.

⁸ *Pacific M. L. Ins. Co. v. Strange*, 223 Ala. 226, 135 So. 477 (1931) (health policy); *Duvall v. National Ins. Co. of Mont.*, 28 Idaho 356, 154 Pac. 632 (1916); *McKendree v. Southern S. L. Ins. Co.*, 112 S. C. 335, 99 S. E. 806 (1919); *Insurance Co. v. Fox*, 106 Tenn. 347, 61 S. W. 62 (1901).

⁹ *Missouri St. L. Ins. Co. v. Cranford*, *supra* note 5; *Powell v. Mutual L. Ins. Co.*, *supra* note 4.

¹⁰ *Flanigan v. Federal L. Ins. Co.*, 231 Ill. 399, 83 N. E. 178 (1907); *Murray v. State M. L. Ins. Co.*, *supra* note 2.

¹¹ *Pacific M. L. Ins. Co. v. Strange*, *supra* note 8; *Priest v. Kansas City L. Ins. Co.*, *supra* note 2; *Citizens L. Ins. Co. v. McClure*, 138 Ky. 138, 127 S. W. 749 (1910); *Metropolitan L. Ins. Co. v. Peeler*, *supra* note 4.

¹² *Metropolitan L. Ins. Co. v. Peeler*, *supra* note 4.

required, by waiving the statutory privileges, but he may not exceed its limitations.¹³ The clause will be enforced according to its terms when the period is shorter or more restrictive than the statute,¹⁴ or when it does not include statutory exceptions,¹⁵ but the insured will be given the statutory rights when the clause is more onerous in time,¹⁶ in exceptions,¹⁷ or in the date from which the clause runs.¹⁸

The Contest

A prolific source of litigation is the problem of what constitutes a "contest" within the meaning of the clause and when such a contest is made. The great majority of jurisdictions hold that legal action is necessary, either by a bill in equity to cancel the policy, or by a defense to suit thereon.¹⁹ The only recognized exception to this majority rule is a valid release from the insured or his beneficiary to the insurer.²⁰ Neither an offer of rescission with tender of premiums, nor a mere notice of cancellation without the insured's consent, nor a refusal for cause to pay the beneficiary is a contest, so as to stop the running of the clause.²¹

¹³ *Beard v. North St. L. Ins. Co.*, 104 S. C. 45, 88 S. E. 285 (1916).

¹⁴ *Duval v. National Ins. Co.*, *supra* note 8; *Ramsay v. Old Colony L. Ins. Co.*, *supra* note 5; *Citizens L. Ins. Co. v. McClure*, *supra* note 11; *Stratton v. Service L. Ins. Co.*, *supra* note 4; *Philadelphia L. Ins. Co. v. Arnold*, 97 S. C. 418, 81 S. E. 964 (1913); *Thistle v. Equitable L. A. Soc.*, 149 Tenn. 667, 261 S. W. 667 (1924).

¹⁵ *Arnold v. Equitable L. A. Soc.*, 228 Fed. 157 (S. D. Iowa 1915) (adjustment for misstatement of age).

¹⁶ *American Nat. Ins. Co. v. Welsh*, 3 S. W. (2d) 946 (Tex. Civ. App. 1928) (statute set 2-year period; clause set 2 years within lifetime of insured). In *Kocak v. Metropolitan L. Ins. Co.*, 144 Misc. 422, 258 N. Y. Supp. 937 (1932), *aff'd*, 237 App. Div. 780, 263 N. Y. Supp. 283 (1933), the clause was of the 2-year "in force" type. At the time the policy was written the statute set a 2-year period, but the statute was later amended to a 2-year lifetime provision. The court enforced the clause as it would have been enforced when the policy was written.

¹⁷ Clauses excepted fraud: *Beard v. North St. L. Ins. Co.*, *supra* note 13; *American Nat. Ins. Co. v. Tabor*, 111 Tex. 155, 230 S. W. 397 (1921).

¹⁸ *Link v. Mutual L. Ins. Co.*, *supra* note 5. The clause read "2 years from date of issue", while the statute was "2 years from date". Policy was dated prior to the date of issue, so clause ran from the policy date.

¹⁹ *Chun Ngit Ngan v. Prudential Ins. Co.*, 9 F. (2d) 340 (C. C. A. 9th, 1925); *Powell v. Mutual L. Ins. Co.*, *supra* note 4; *Repala v. John Hancock M. L. Ins. Co.*, 229 Mich. 463, 201 N. W. 465 (1924); *American Trust Co. v. Life Ins. Co.*, 173 N. C. 558, 92 S. E. 706 (1917); *Thistle v. Equitable L. A. Soc.*, *supra* note 14. *Contra*: *Mutual L. Ins. Co. v. Hurni Packing Co.*, 280 Fed. 18 (C. C. A. 8th, 1922), *aff'd*, 263 U. S. 167, 44 Sup. Ct. 90 (1923), to the effect that a refusal to pay for cause is a sufficient act of contest; *Steigler v. Eureka L. Ins. Co.*, 146 Md. 629, 127 Atl. 397 (1925), that the company may, at its option, rescind for cause by any definite word or act, so long as it does not unreasonably delay; *Feierman v. Eureka L. Ins. Co.*, 279 Pa. 507, 124 Atl. 171 (1924), that the company must at least disavow liability within the period, not necessarily by legal action, but by some definite step specifying the ground of complaint.

²⁰ *Eichwedel v. Metropolitan L. Ins. Co.*, 216 Mo. App. 452, 270 S. W. 415 (1925); *Telford v. Metropolitan L. Ins. Co.*, 223 App. Div. 175, 228 N. Y. Supp. 54 (1928), *aff'd*, 250 N. Y. 528, 166 N. E. 311 (1928); see *Mack v. Conn. Gen. L. Ins. Co.*, 12 F. (2d) 416 (C. C. A. 8th, 1926); *Rose v. Mutual L. Ins. Co.*, 19 F. (2d) 280 (C. C. A. 6th, 1927); *cf.* *New York L. Ins. Co. v. Hudson*, 39 F. (2d) 848 (C. C. A. 5th, 1930), where acceptance of a premium refund by the beneficiary did not suspend the clause as there was no proof that the company was misled to think payment would not be demanded; *Indiana Nat. L. Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289 (1913), where a release, made by insured, was held invalid because made without the consent of the beneficiary, even though the beneficiary could have been changed by the insured at any time; *Killian v. Metropolitan L. Ins. Co.*, *supra* note 5, where a release given by a mother was held invalid as to her four minor children.

²¹ *Jefferson St. L. Ins. Co. v. McIntyre*, 294 Fed. 886 (C. C. A. 5th, 1923); *New York L. Ins. Co. v. Adams*, 202 Ind. 493, 176 N. E. 146 (1931); *Gorski v. Metropolitan L. Ins.*

The contest, whether it be by action to cancel or by defense to a suit, must be made within the period of contestability as stated in the policy. The company must file its bill or answer before the period expires. The fact that the beneficiary has started suit before the policy becomes incontestable does not suspend the running of the clause, and the company's answer, if entered after the expiration of the period, does not relate back to the start of the action.²² But if the company "contests" within the period, it may perfect its pleas by amendment after the expiration of the time for contest.²³

The Period of Contestability

Whenever the date from which the incontestable clause is to run is ambiguous, the courts resolve the doubt in favor of the insured or the beneficiary, following the rule that ambiguous terms in the policy will be construed strictly against the insurer. Thus where the date stated in the policy varies from the statutory date,²⁴ the earlier one will be given effect,²⁵ and a period "from date of issue" is often held to mean "from policy date".²⁶ Also, where the insured's policy with one company is reinsured or taken over and assumed by a successor, the original policy clause is enforced as of its own date.²⁷ When the policy proper is preceded by short-term insurance, interim certificates, or binding slips, to give effect to the insurance before the policy is issued, the clause runs from the date of the certificates,²⁸ notwithstanding the fact that the clause may read "from date of policy"; and a rider issued subsequently to the policy, but specifying that it is part of the original contract, is covered by the original clause as of the policy date.²⁹

When the insured dies within the contestable period, a construction of the wording of the clause is necessary to determine whether the clause continues to run against the insurer and in favor of the beneficiary. When the clause is one of the stated period type such as "1 year after date" or "2 years after date", the

Co., 88 Pa. Super. 326 (1926), where it was held that an offer of rescission was not a declaration that the company was no longer bound within the language of the *Feirman* case, *supra* note 19; *Humpston v. State M. L. A. Co.*, 148 Tenn. 439, 256 S. W. 438 (1923).

²² *Missouri St. L. Ins. Co. v. Cranford*, *supra* note 5; *Wolpin v. Prudential Ins. Co.*, 223 App. Div. 339, 228 N. Y. Supp. 78 (1928).

²³ *Scharlach v. Pacific M. L. Ins. Co.*, 9 F. (2d) 317 (C. C. A. 5th, 1925); see *Joseph v. New York L. Ins. Co.*, 308 Ill. 93, 139 N. E. 32 (1923); *cf. Becker v. Illinois L. Ins. Co.*, 227 Mich. 388, 198 N. W. 884 (1924), where an amended plea was held not to be a defense because it was the first notice to the beneficiary of a contest for fraud, and was not entered until more than a year from the expiration of the contestable period; *Tracy L. & T. Co. v. Mutual L. Ins. Co.*, 79 Utah 33, 7 P. (2d) 279 (1932), where a plea filed in a court later declared to have no jurisdiction was no contest, and did not suspend the running of the clause.

²⁴ The dates from which the statutes state the clause shall run vary, but the most common are the date of the policy, the date of issue, or the effective date of insurance.

²⁵ *Link v. Mutual L. Ins. Co.*, *supra* note 5.

²⁶ *Mutual L. Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 Sup. Ct. 90 (1923) (where policy antedated); *Great Southern L. Ins. Co. v. Russ*, *supra* note 5; *Monahan v. Fidelity M. L. Ins. Co.*, 242 Ill. 488, 90 N. E. 213 (1909); *Meridian L. Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879 (1916). *Contra*: *Prudential Ins. Co. v. Connallon*, 108 N. J. Eq. 316, 154 Atl. 729 (1931), *rev'd* 106 N. J. Eq. 251, 150 Atl. 564 (1930). In the *Monahan* case, the clause read "after policy shall be in continuous force 2 years". The policy also provided that it should not be in force until the first premium had been paid, but the court held that the clause ran from the policy date, rather than the date of the first premium payment.

²⁷ *Arrowsmith v. Old Colony L. Ins. Co.*, 164 Ill. App. 44 (1911); *Bethke v. Cosmopolitan L. Ins. Co.*, 262 Ill. App. 586 (1931); *Wood v. Cosmopolitan L. Ins. Co.*, 266 Ill. App. 556 (1932).

²⁸ *Jefferson St. L. Ins. Co. v. Wilson*, 260 Fed. 593 (C. C. A. 5th, 1919); *Schwartz v. Northern L. Ins. Co.*, 25 F. (2d) 555 (C. C. A. 9th, 1928), *rev'd* 19 F. (2d) 142 (N. D. Cal. 1927), *certiorari* denied, 278 U. S. 628, 49 Sup. Ct. 29 (1928); *American Nat. Ins. Co. v. Thompson*, 186 S. W. 254 (Tex. Civ. App. 1916).

²⁹ *Wamboldt v. Reserve L. L. Ins. Co.*, 191 N. C. 32, 131 S. E. 395 (1926).

great majority hold that it continues to run,³⁰ and if the period elapses before a "contest" by the insurer, the policy becomes incontestable. But where the clause is of the "1 year after date and within the lifetime of the insured" type, the insured must survive the period. If he dies before its expiration, the rights of the parties are fixed by his death, and the policy cannot thereafter become incontestable.³¹ A few clauses are worded "after 2 years in force", and these are usually given the same effect as the "lifetime" clauses, as the courts declare a policy not to be in force after the insured dies.³² In Minnesota, clauses of whatever type are held not to survive the death of the insured and the rights of the parties become fixed upon the happening of that event.³³

Where the clause is of the stated period type and is held to run after the death of the insured, it may be within the power of the beneficiary to refrain from bringing suit until after the period has expired, thus barring any defense which the company might have had at the time of the insured's death. The company has no adequate remedy at law, because the possibility of defense would depend upon its opponent bringing suit within the period. Equitable jurisdiction to cancel follows.³⁴ Where the clause is of the "lifetime" type or the "period in force" type, and is held not to run after the insured's death, so that the rights of the parties are fixed, the company has an adequate remedy at law since it can defend no matter when the beneficiary may sue.³⁵ The Minnesota courts, following their rule that the clause never runs after the death of the insured, consequently hold that equity never has jurisdiction to cancel.³⁶

³⁰ *Mutual L. Ins. Co. v. Hurni Packing Co.*, *supra* note 26; *New York L. Ins. Co. v. Rigas*, 117 Conn. 437, 168 Atl. 22 (1933); *Monahan v. Metropolitan L. Ins. Co.*, 283 Ill. 136, 119 N. E. 68 (1918); *Aetna L. Ins. Co. v. Daniel*, 328 Mo. 876, 42 S. W. (2d) 584 (1931); *New York L. Ins. Co. v. Steinman*, 103 N. J. Eq. 403, 143 Atl. 529 (1928); see *Jensen v. Metropolitan L. Ins. Co.*, 251 N. Y. 336, 167 N. E. 462 (1929), *rev'g* 225 App. Div. 834, 232 N. Y. Supp. 779 (1929).

³¹ *Aetna L. Ins. Co. v. Kennedy*, 31 F. (2d) 971 (C. C. A. 8th, 1929); *Greenbaum v. Columbian Nat. L. Ins. Co.*, 62 F. (2d) 56 (C. C. A. 2d, 1932); see *Chicago Nat. L. Ins. Co. v. Carbaugh*, 337 Ill. 483, 169 N. E. 218 (1929).

³² *Jefferson St. L. Ins. Co. v. Smith*, 157 Ark. 499, 248 S. W. 897 (1923); *Thomas v. Metropolitan L. Ins. Co.*, 135 Kan. 381, 10 P. (2d) 864 (1932). *Contra*: *Jefferson St. L. Ins. Co. v. McIntyre*, 294 Fed. 886 (C. C. A. 5th, 1923), *rev'g* 285 Fed. 570 (S. D. Fla. 1922). At the time of the decision in the Hurni case, *supra* note 26, the District Court had decided *Jefferson v. McIntyre*. In its opinion, the Supreme Court distinguished the clause involved from those in the McIntyre and Smith cases, and therefore its decision was contrary. But when the McIntyre case was reviewed by the Circuit Court of Appeals, this distinction was ignored and the Hurni case followed.

³³ *Mutual L. Ins. Co. v. Stevens*, 157 Minn. 253, 195 N. W. 913 (1923). *Contra*: *Mutual L. Ins. Co. v. Conley*, 55 F. (2d) 421 (D. Minn. 1932). The federal court held that the question was one of general jurisprudence and therefore it was not bound to follow the Minnesota rule.

³⁴ *Bankers' L. Co. v. Guzan*, 2 F. Supp. 35 (W. D. Pa. 1932); *New York L. Ins. Co. v. Rigas*, *supra* note 30; see *Aetna L. Ins. Co. v. Daniel*, *supra* note 30 (the company must allege that the beneficiary has not brought suit at law). It is also the majority rule that when the company has once commenced an equitable action, wherein equity has jurisdiction, such jurisdiction cannot be displaced by a subsequent action at law by the beneficiary. *Peake v. Lincoln Nat. L. Ins. Co.*, 15 F. (2d) 395 (C. C. A. 8th, 1926); *Keystone Dairy Co. v. New York L. Ins. Co.*, 19 F. (2d) 68 (C. C. A. 3d, 1927); *cf.* *New York L. Ins. Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8th, 1929) (decided on special facts); *New York L. Ins. Co. v. McCarthy*, 22 F. (2d) 241 (C. C. A. 5th, 1927) (equitable action maintainable but unnecessary).

³⁵ *Aetna L. Ins. Co. v. Kennedy*; *Chicago Nat. L. Ins. Co. v. Carbaugh*, both *supra* note 31.

³⁶ *Indianapolis L. Ins. Co. v. Aaron*, 158 Minn. 359, 197 N. W. 757 (1924); *Northwestern M. L. Ins. Co. v. Laury*, 174 Minn. 498, 219 N. W. 759 (1928). *Contra*: *Mutual L. Ins. Co. v. Conley*, *supra* note 33.

If the company fails to contest the policy within the period allowed, it becomes incontestable according to its terms immediately.³⁷ Payment of the next succeeding premium is not essential to make the policy incontestable as of the end of the preceding year, so that if the insured dies within the period of grace without having remitted his second annual premium, a one year after date clause has expired and the policy is incontestable.³⁸

Where a beneficiary is named by the policy and the insured dies within the period of contestability, the company may bring action to cancel against the beneficiary, so the clause is not suspended pending the appointment of an executor or administrator,³⁹ but where no beneficiary is named or the policy is payable to the insured's estate, his death leaves no one against whom the action to cancel will lie. In such a case, the clause is suspended until the administrator is appointed, and begins to run again against the company as soon as a party is available.⁴⁰

Defenses Available to the Insurer After the Incontestable Clause Has Run

The cases commonly express the rule of law that "the clause covers all defenses not specifically excepted".⁴¹ It is unfortunate that the language used is so broad because it has been the source of several misconceptions, chief among which is the failure to distinguish between conditions and excepted risks.⁴² Nor is the language quoted strictly accurate since the law often implies the exception of fraud⁴³ in policies incontestable from date, and non-payment of premiums and abandonment of the contract are implied exceptions to an otherwise silent clause.⁴⁴ However, since the exceptions may be anything that the statute permits, the clause either covers the questions raised, or specifically excepts them, in the great majority of cases. The common provisions excluding from the operation of the clause military and naval service in time of war,⁴⁵ total and permanent disability and double indemnity riders,⁴⁶ and adjustment for misstatement of age,⁴⁷ are the

³⁷ The clause is not extended by the provisions of a practice act allowing a defendant 20 days in which to answer. Whether the beneficiary starts suit within 20 days of the expiration of the period or not, the company must contest by defense or action within the period. *Wolpin v. Prudential Ins. Co.*, *supra* note 22.

³⁸ *Fairfield v. Union L. Ins. Co.*, 196 Ill. App. 7 (1915); *Young v. Union L. Ins. Co.*, 202 Ill. App. 321 (1916). Policies customarily provide that the insured shall have 30 days' grace in which to pay his premium, before the policy shall lapse.

³⁹ *Chun Ngit Ngan v. Prudential Ins. Co.*, *supra* note 19; *Link v. Mutual L. Ins. Co.*, *supra* note 5.

⁴⁰ See *Ramsay v. Old Colony L. Ins. Co.*, *supra* note 5; *Jensen v. Metropolitan L. Ins. Co.*, *supra* note 30. But where the company did not learn of the insured's fraud until after the executor was appointed, no time allowance will be made because the company could not possibly have sued to cancel. *Northwestern M. L. Ins. Co. v. Pickering*, 293 Fed. 496 (C. C. A. 5th, 1923), *certiorari* denied, 263 U. S. 720, 44 Sup. Ct. 229 (1924).

⁴¹ *Wamboldt v. Federal L. L. Ins. Co.*, *supra* note 29; *Plotner v. Northwestern Nat. L. Ins. Co.*, 48 N. D. 295, 183 N. W. 1000 (1921); *United Sec. L. Ins. & Tr. Co. v. Massey*, 159 Va. 832, 167 S. E. 248 (1933); *Millis v. Continental L. Ins. Co.*, 162 Wash. 555, 298 Pac. 739 (1931).

⁴² See *infra* notes 56 and 57.

⁴³ See *supra* note 7.

⁴⁴ *Haas v. Mutual L. Ins. Co.*, 90 Neb. 808, 134 N. W. 937 (1912).

⁴⁵ *American Nat. Ins. Co. v. Turner*, 226 S. W. 487 (Tex. Civ. App. 1920).

⁴⁶ *Penn Mutual L. Ins. Co. v. Hartle*, 166 Atl. 614 (Md. 1933); *Chambers v. New York L. Ins. Co.*, 148 Misc. 561, 265 N. Y. Supp. 217 (1933); *Millis v. Continental L. Ins. Co.*, *supra* note 41.

⁴⁷ In *Mutual L. Ins. Co. v. New*, 125 La. 41, 51 So. 61 (1910), the misstatement of age provision was not incorporated in the incontestable clause but in a separate clause which the court held was controlled by the incontestable clause, thus limiting the insurer's right to contest for this reason to the contestable period. But in *Taylor v. Unity Industrial Ins. Co.*, 147 So. 91 (La. App. 1933), the court stated that the age adjustment provision was not to be controlled by the incontestable clause. However, the company had failed to get its objection

most frequently used exceptions, while practically every clause in use at present precludes, upon the expiration of the contestable period, the defenses that the policy never took effect or was invalid in its inception because of fraud,⁴⁸ or lack of good health on the part of the insured at the time the policy was delivered.⁴⁹

There are, however, a number of defenses, available to the company in spite of the expiration of the contestable period, which are not exceptions. For example, it is well settled that a dispute by the insurer of the amount due, rather than the validity of the policy, does not come within the operation of the clause,⁵⁰ and the company is not precluded from showing that the beneficiary has not sued within the time allowed by the policy,⁵¹ nor from setting up clerical errors in the policy where the insured had knowledge that such errors existed,⁵² nor from denying that insurance was ever written on the insured's life because of a substitution during the medical examination.⁵³ It has been held that the clause does not run to protect a stranger to the contract,⁵⁴ but, on the other hand, an assignee of the insured, misled by the terms of the policy, has been allowed to recover over the defense of fraud even though the period had not yet expired.⁵⁵

Most of the remaining cases enabling the insurer to avoid liability despite the incontestable clause fall into two classes: those holding valid a limitation on the coverage or risk assumed by the insurer, and those declaring a public policy against recovery under the particular facts of the case. In the first group there is much confusion resulting from a failure to distinguish between a limitation on the risk assumed by the company and a breach by the insured of a condition subsequent in the policy. The former is illustrated by a policy provision that the company will not be liable if the insured dies under certain circumstances, such as while flying, or by suicide, or while engaged in a prohibited occupation. If the insured dies while engaged in such a pursuit, the insurer is not liable whether

properly on the record. In *Murphy v. Travelers Ins. Co.*, 134 Misc. 238, 234 N. Y. Supp. 278 (1928), adjustment was permitted. The principal Pennsylvania cases are *Sipp v. Philadelphia L. Ins. Co.*, 293 Pa. 292, 142 Atl. 221 (1928); *Central Trust Co. v. Fidelity M. L. Ins. Co.*, 45 Pa. Super. 313 (1911); *Mitchell v. Pennsylvania M. L. Ins. Co.*, 90 Pa. Super. 426 (1927).

⁴⁸ *Southern U. L. Ins. Co. v. White*, 188 S. W. 266 (Tex. Civ. App. 1916).

⁴⁹ *Hurt v. New York L. Ins. Co.*, 51 F. (2d) 936 (C. C. A. 10th, 1931); *Kanter v. Continental A. Co.*, 251 Ill. App. 272 (1929); *Prudential Ins. Co. v. Connallon*, *supra* note 26; *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554 (1911). In *Independent L. Ins. Co. v. Carroll*, *supra* note 6, this defense was held covered because the company did not allege it to be "actual and intended fraud" within an exception to the clause.

⁵⁰ *Sanders v. Jefferson St. L. Ins. Co.*, 10 F. (2d) 143 (C. C. A. 5th, 1925) (double indemnity); *Columbian Nat. L. Ins. Co. v. Black*, 35 F. (2d) 571 (C. C. A. 10th, 1929) (printer's error); *Murphy v. Travelers Ins. Co.*, *supra* note 47 (adjustment for misstatement of age); *Sipp v. Philadelphia L. Ins. Co.*, *supra* note 47 (adjustment for misstatement of age); *Buck v. Equitable L. A. Soc.*, 96 Wash. 683, 165 Pac. 878 (1917) (printer's error); *cf. Mitchell v. Pennsylvania M. L. Ins. Co.*, *supra* note 47, where the company, instead of admitting liability on a policy wherein the insured had misstated his age, and offering to pay the correct amount, denied all liability on the ground that it did not write risks of that age. This defense was held barred, and the beneficiary recovered the face amount.

⁵¹ *Illinois Bankers' L. Ass'n v. Byasse*, 169 Ark. 230, 275 S. W. 519 (1925); *Brady v. Prudential Ins. Co.*, 168 Pa. 645, 32 Atl. 102 (1895).

⁵² *Columbian Nat. L. Ins. Co. v. Black*; *Buck v. Equitable L. A. Soc.*, both *supra* note 50.

⁵³ *Maslin v. Columbian Nat. L. Ins. Co.*, 3 F. Supp. 368 (S. D. N. Y. 1932).

⁵⁴ *Prudential Ins. Co. v. Mohr*, 185 Fed. 936 (D. R. I. 1911). In *Mohr v. Prudential Ins. Co.*, *supra* note 49, the beneficiary recovered on a policy fraudulently obtained by conspirators, because the incontestable clause had run. Here the company sought to recover from one of the conspirators in an action of fraud and deceit. The court held that the running of the clause was no defense to such a party.

⁵⁵ *State M. L. Ins. Co. v. Rosenberry*, 175 S. W. 757 (Tex. Civ. App. 1915). It did not appear on the face of the policy that there had been a default and reinstatement.

the incontestable clause has run or not.⁵⁶ The latter is illustrated by a provision that the policy shall be "void" if the insured *engages* in the forbidden pursuit. This purports to relieve the insurer whether or not the insured dies as a result of the forbidden conduct, *i. e.*, the clause is not a limitation of the risk, but a matter of defense, and so is barred by the running of the clause.⁵⁷

The cases allowing the insurer a defense based on public policy fall into two main classes. No recovery may be had on a policy which does not meet the requirements of the law with regard to insurable interest,⁵⁸ because the contract is a wager and invalid, and the incontestable clause does not serve to validate it. The clause, being part of the policy, falls with the whole.⁵⁹ The second group of cases under the public policy defenses covers those situations wherein recovery is sought for the death of the insured by his own criminal act, or at the hands of justice, whether there is a policy provision excluding such deaths from the risk assumed or not.

In 1830 the House of Lords, in *The Amicable Society v. Bolland*,⁶⁰ held that there can be no recovery on a life insurance policy when the insured is executed for felony; that public policy so forbids. The court developed the theory that, since the policy would be void if the insurance were written specifically to protect against death by execution, to allow recovery would be to insert by implication a clause which would, if expressed, render the policy void. The *Bolland* case has been followed in the United States by the Supreme Court,⁶¹ on the theory that

⁵⁶ *Sanders v. Jefferson St. L. Ins. Co.*, *supra* note 50 (injuries intentionally inflicted by a third person); *Flannagan v. Provident L. & A. Ins. Co.*, 22 F. (2d) 136 (C. C. A. 4th, 1927) (injuries received in driving while drunk); *Wright v. Philadelphia L. Ins. Co.*, 25 F. (2d) 514 (E. D. S. C. 1927) (suicide); *Head v. Hartford Acc. & Indem. Co.*, 43 F. (2d) 517 (C. C. A. 10th, 1930) (aerial navigation). The incontestable clause is not a mandate as to coverage, and the exceptions to the clause do not militate against this construction. *Lee v. Southern L. & H. Ins. Co.*, 19 Ala. App. 535, 98 So. 696 (1924) (death by malicious act of beneficiary); *Metropolitan L. Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642 (1930) (aerial navigation); *McCreighton v. American Cath. U.*, 71 Pa. Super. 332 (1919) (death in consequence of an immoral act—abortion). *Contra*: *Philadelphia L. Ins. Co. v. Burgess*, 18 F. (2d) 599 (E. D. S. C. 1927) (suicide); *Standard L. Ins. Co. v. Robbs*, 177 Ark. 275, 6 S. W. (2d) 520 (1928) (suicide); *Sun L. Ins. Co. v. Taylor*, 108 Ky. 408, 56 S. W. 668 (1900) (death as the result of the insured's own criminal act); *Bernier v. Pacific M. L. Ins. Co.*, 173 La. 1078, 139 So. 629 (1932) (aerial navigation). The court was influenced by the fact that the incontestable clause named certain exceptions. It held that this fact showed an intent to exclude all others. The *Phila. v. Burgess*, *Standard Life v. Robbs*, *Sun Life v. Taylor*, and *Bernier* cases are clearly incorrect holdings. The company's risk is also often limited to the results of disease or accident striking after the insurance comes into force, and there is then no liability, though the contestable period may have expired, for results caused by disease or accident occurring before the insurance attached. *John Hancock M. L. Ins. Co. v. Hicks*, 43 Ohio App. 242, 183 N. E. 93 (1931); *Barnes v. Aetna L. Ins. Co.*, 7 S. W. (2d) 946 (Tex. Civ. App. 1928). *Contra*: *Kansas City L. Ins. Co. v. Hislip*, 154 Okla. 42, 6 P. (2d) 678 (1932).

⁵⁷ *United Sec. L. Ins. & T. Co. v. Massey*, *supra* note 41; see *Head v. Hartford Acc. & Indem. Co.*, *supra* note 56; *Jolley v. Jefferson St. L. Ins. Co.*, 199 N. C. 269, 154 S. E. 400 (1930).

⁵⁸ *Aetna L. Ins. Co. v. Hooker*, 62 F. (2d) 805 (C. C. A. 6th, 1933); *Home L. Ins. Co. v. Masterson*, 180 Ark. 170, 21 S. W. (2d) 414 (1929); *People v. Alexander*, 183 App. Div. 868, 171 N. Y. Supp. 881 (1918), *aff'd*, 225 N. Y. 717, 122 N. E. 887 (1919); *Logan v. Texas M. L. Ins. Ass'n*, 51 S. W. (2d) 288 (Comm. App. Tex. 1932). *Contra*: *Bogacki v. Great W. L. A. Co.*, 253 Mich. 253, 234 N. W. 865 (1931). The court held that a statute excepting from the operation of the clause only military and naval service declared the state's public policy, and that therefore the clause ran on this defense and the policy became incontestable.

⁵⁹ *Bromley's Adm'r v. Washington L. Ins. Co.*, 122 Ky. 402, 92 S. W. 17 (1906).

⁶⁰ 4 Bligh N. R. 194 (1830).

⁶¹ *Burt v. Union C. L. Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. 139 (1902); *Northwestern M. L. Ins. Co. v. McCue*, 223 U. S. 234, 32 Sup. Ct. 220 (1912). In the latter case the court construed a Virginia contract, applying Virginia public policy, with which it agreed.

there is an implied condition in every policy that the insured will do nothing to accelerate wrongfully the maturity of the contract, and that public policy forbids the insertion of a condition that would tend to induce crime.⁶² A few of the states follow this line of decisions either on the ground that an express provision would be void, and that where there is no such stipulation, such a death could not have been within the contemplation of the parties,⁶³ or upon the theory that a denial of recovery will deter crime.⁶⁴

The opposite result has been reached in other jurisdictions. In one state the court repudiated decisions to the contrary, holding that the fact that an express provision would void the policy has no effect upon a policy silent in respect to this circumstance, and answering the objection that the parties did not contemplate such an assumption of risk by holding that there is nothing to show that the company intended to exclude it.⁶⁵ Another court has allowed recovery for the death of the insured in consequence of a criminal act, on the unsound ground that the incontestable clause covered a risk excluded by the policy,⁶⁶ and yet another has stated that its public policy is "conclusively evidenced by its constitution and statutes prohibiting forfeiture for conviction of crime", and the contract is enforceable.⁶⁷ The last court distinguished the *Bolland* case on the ground that at the time of the English decision, the forfeiture laws of England had not yet been repealed.⁶⁸ A Tennessee decision,⁶⁹ also distinguishing the *Bolland* case, expressed surprise that none of the American cases denying recovery had discussed the fact that American law has never countenanced forfeitures. This last argument may be answered, as it has been in Pennsylvania,⁷⁰ by pointing out that though the court is powerless to work forfeiture where an heir murders his intestate, it may still refuse to aid recovery where an "abuse of contract rights appears". However, if this latter ground is the only justification for those decisions denying recovery on the policy, it would seem better to permit recovery, thus avoiding hardship to innocent parties, and strengthening the credit function of the policy.

Riders and Supplemental Contracts

Often when riders or supplemental contracts are attached to the policy, the question arises whether they are controlled by the incontestable clause in the policy proper. The clause in the original policy will not affect the supplemental contract

⁶² It is obviously absurd to consider this rule of law a deterrent to crime. If the insured is willing to risk the death penalty, there are few cases indeed where he will desist from his crime because his insurance would thereby be void.

⁶³ *Scarborough v. American Nat. Ins. Co.*, 171 N. C. 353, 88 S. E. 482 (1916).

⁶⁴ *Collins v. Metropolitan L. Ins. Co.*, 27 Pa. Super. 353 (1905); *cf. Patterson v. Natural P. M. L. Ins. Co.*, 100 Wis. 118, 75 N. W. 980 (1898), where the court held that it was not against public policy to allow recovery for suicide of the insured, and a policy provision excluding the risk of insured's death in violation of law must be limited to violations of law for which there is a punishment.

⁶⁵ *Weeks v. New York L. Ins. Co.*, 128 S. C. 121, 122 S. E. 586 (1924). Georgia has no public policy against recovery, *Murphy v. Metropolitan L. Ins. Co.*, 152 Ga. 393, 110 S. E. 178 (1921), answer to certified question conformed to 28 Ga. App. 71, 110 S. E. 311 (1922). And Texas holds that to deny recovery "the court is required to find a long lasting malice". *American Nat. Ins. Co. v. Coates*, 112 Tex. 267, 246 S. W. 356 (1923).

⁶⁶ *Sun L. Ins. Co. v. Taylor*, *supra* note 56.

⁶⁷ *Collins v. Metropolitan L. Ins. Co.*, 232 Ill. 37, 83 N. E. 542 (1908).

⁶⁸ The acts of 33 & 34 Vicr., c. 23, abolishing forfeiture for felony, were not passed until 1870.

⁶⁹ *Fields v. Metropolitan L. Ins. Co.*, 147 Tenn. 464, 249 S. W. 798 (1923).

⁷⁰ *Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637 (1895). In compliance with the court's suggestion, the Assembly legislated *Carpenter's Estate* out of the law of Pennsylvania so that a person who murders his intestate is now disqualified from taking as his heir at law. However, the statute does not affect the point here made.

when either so specifies,⁷¹ but where the riders state that they are part of the original contract, they are included in the operation of the original clause;⁷² and the same result is held where both clause and rider are silent on this point.⁷³

Reinstatement

Although the courts differ whether reinstatement after a lapse creates a new contract,⁷⁴ or "revitalizes" the old one,⁷⁵ it is usually held that, when the reinstatement is silent, a period of contestability similar to that of the original policy begins to run.⁷⁶ It follows that when the clause has run after reinstatement the policy is incontestable,⁷⁷ but a minority view refuses to establish any clause limiting the period of contestability,⁷⁸ and one court has held that reinstatement is neither the old nor a new policy, but a contract to restore the old policy, to which contract the clause is not applicable.⁷⁹

J. M. H.

PROOF OF PRE-RECEIVERSHIP CLAIMS AND DISTRIBUTION OF RECEIVERSHIP ASSETS IN PRIMARY AND ANCILLARY JURISDICTIONS—A corporation has been placed under the protection of equity; primary and ancillary receivers have been appointed; corporate property located in the various jurisdictions has been placed *in custodia legis*.¹ Proofs of claim must now be filed so that claimants may participate in the final distribution of the receivership assets.² If the corporation has engaged in business in many states a number of receivers will have been appointed and claimants will reside in many different localities. The claimant must at this point determine the proper jurisdiction in which to file his proof of claim. Shall it be the jurisdiction in which he resides, the primary jurisdiction, any convenient one, or every one where receivership proceedings have been instituted? This note attempts to set forth the limitations of choice, the factors which should be considered in choosing one jurisdiction or another, and the problems likely to arise from any particular selection.

A claimant, residing in an ancillary jurisdiction, may, if he chooses,³ present his petition in that jurisdiction,⁴ for an unnecessary inconvenience and expense

⁷¹ Penn Mutual L. Ins. Co. v. Hartle, *supra* note 46 (rider excluded itself from the operation of the clause); Chambers v. New York L. Ins. Co., *supra* note 46; see Millis v. Continental L. Ins. Co., *supra* note 41 (clause excepted disability benefits).

⁷² Wamboldt v. Reserve L. L. Ins. Co., *supra* note 29.

⁷³ Kanter v. Continental A. Co., *supra* note 49; Kansas City L. Ins. Co. v. Hislip, *supra* note 56.

⁷⁴ New York L. Ins. Co. v. Seymour, 45 F. (2d) 47 (C. C. A. 6th, 1930); State L. Ins. Co. v. Spencer, 62 F. (2d) 640 (C. C. A. 5th, 1933); Pacific M. L. Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204 (1905).

⁷⁵ Mutual L. Ins. Co. v. Dreeben, 20 F. (2d) 394 (N. D. Tex. 1927).

⁷⁶ Great Western L. Ins. Co. v. Snively, 206 Fed. 20 (C. C. A. 9th, 1913); Aetna L. Ins. Co. v. Daniel, *supra* note 30; Teeter v. United L. Ins. Ass'n, 159 N. Y. 411, 54 N. E. 72 (1899); McCormack v. Security M. L. Ins. Co., 220 N. Y. 447, 116 N. E. 74 (1917), *rev'd* 161 App. Div. 33, 146 N. Y. Supp. 613 (1914).

⁷⁷ Northwestern M. L. Ins. Co. v. Pickering, *supra* note 40.

⁷⁸ Umans v. New York L. Ins. Co., 259 Mass. 573, 156 N. E. 721 (1927).

⁷⁹ New York L. Ins. Co. v. Feicht, 29 F. (2d) 318 (N. D. Ill. 1928).

¹ 16 FLETCHER, CORPORATIONS (Perm. ed. 1933) 272.

² *Id.* at 542 *et seq.*

³ Some courts, however, will, in the exercise of their discretion, refuse to adjudicate any proof of claim at all, even of local claimants; but will remit all questions of proof of claim to the primary court. Superior Cabinet Corp. v. American Piano Co., 39 F. (2d) 87 (D. Mass. 1930).

⁴ New York Security & Trust Co. v. Equitable Mortgage Co., 71 Fed. 556 (C. C. W. D. Mo. 1896); Whelan v. Enterprise Transportation Co., 166 Fed. 138 (C. C. S. D. N. Y.

would be imposed by compelling him to proceed to a point remote from his residence to have the existence and extent of his claim adjudicated. It is therefore unnecessary that the petition for "allowance" be presented to the court exercising primary jurisdiction.⁵

Whether a claimant residing in one ancillary jurisdiction may file his proof of claim in another ancillary jurisdiction has, as yet, not been conclusively determined. Although it has been held that such a procedure will not be permitted,⁶ the reason for such objection is not readily apparent. In the closely analogous field of decedents' estates a claimant residing in one jurisdiction may present his petition in any other jurisdiction where administrators have been appointed.⁷ When it is considered that in presenting a proof of claim a petitioner is asking the court to acknowledge that he has a claim against the corporation, which gives him the right to share in the assets⁸ in the court's custody, there seems to be no equitable reason for refusal.⁹

In contrast, it has never been contended that a claimant residing in an ancillary jurisdiction may not, if he chooses, present his petition to the court exercising primary jurisdiction.¹⁰ The primary receiver is usually the focal point of the entire proceedings—he, with the approval of the court which appointed him, normally determines the proportionate share each claimant will receive and he makes the final distribution. It is advantageous for the claimant, therefore, to present his proof of claim to that official and thus be assured of obtaining a proper share on final distribution of the funds remitted by the ancillary receivers to the primary court.

Likewise, on the basis of reciprocity, a claimant residing in the primary jurisdiction may present his proof of claim not only to that court but also to any other court where receivership proceedings have been instituted.¹¹ Furthermore, filing a claim in one jurisdiction is no bar to its subsequent presentation in another jurisdiction.¹² An alert claimant, therefore, presents his claim in every jurisdic-

1908); *Pfahler v. McCrum-Howell Co.*, 197 Fed. 684 (E. D. Wis. 1912); *Brooks v. Smith*, 290 Fed. 33 (C. C. A. 1st, 1923). As to a claimant residing in this country being permitted to file proof of claim in the ancillary court here, when the primary court is in a foreign country, see *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 147, 168, 151 N. E. 159, 165 (1926).

⁵ *Pfahler v. McCrum*, *supra* note 4; *cf.* *Clark v. Painted Post Lumber Co.*, 89 N. J. Eq. 409, 104 Atl. 728 (1918); see *New York Security & Trust Co. v. Equitable Mortgage Co.*, *supra* note 4, at 558; *MacMurray v. Sidwell*, 155 Ind. 560, 565, 58 N. E. 722, 724 (1900).

⁶ *Clyde v. Richmond & D. R. R.*, 65 Fed. 336 (C. C. N. D. Ga. 1894); *cf.* *Gerding v. East Tennessee Land Co.*, 185 Mass. 380, 70 N. E. 206 (1904). But see *Barley v. Gittings*, 15 App. D. C. 427, 445 (1899); *Thornley v. J. C. Walsh Co.*, 207 Mass. 62, 66, 92 N. E. 1007, 1008 (1910).

⁷ *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817 (C. C. A. 8th, 1908); *Bertram v. Jones*, 205 Ky. 691, 266 S. W. 385 (1924); *Carroll v. McPike*, 53 Miss. 569 (1876); *In re Hadden*, 193 App. Div. 908, 183 N. Y. Supp. 695 (1920).

⁸ 16 FLETCHER, *op. cit.* *supra* note 1, at 619.

⁹ The recently published draft of the CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) Proposed Final Draft No. 5, § 2060, provides that claimants, regardless of where they are domiciled, can prove their claims in any jurisdiction in which a receiver has been appointed.

¹⁰ *Cowen v. Failey*, 149 Ind. 382, 49 N. E. 270 (1898); *cf.* *Drury v. Doherty*, 131 Misc. 642, 227 N. Y. Supp. 593 (1928); *In re Phillips (Casualty Co. of America)*, 206 App. Div. 314, 200 N. Y. Supp. 639 (1923).

¹¹ *Mitchell v. Liberty Clay Products Co.*, 291 Pa. 282, 139 Atl. 853 (1927); *Thornley v. J. C. Walsh Co.*, *supra* note 6; 1 CLARK, RECEIVERS (2d ed. 1929) 443.

¹² *In re Phillips (Casualty Co. of America)*, *supra* note 10 (claimant residing in ancillary jurisdiction had presented claim there and is now permitted to present claim in primary jurisdiction); *Mitchell v. Liberty Clay Products Co.*, *supra* note 11 (claimant residing in primary jurisdiction had presented claim there and is now permitted to present claim in ancillary jurisdiction). *Contra:* *Gerding v. East Tennessee Land Co.*, *supra* note 6; *cf.* *Conti-*

tion so that, upon the distribution by the various courts of the funds located in the different jurisdictions, he will receive his full proportionate share even though a particular ancillary court refuses to permit its receiver to remit the funds placed in his custody to the primary jurisdiction.¹³

A situation distinct from any discussed thus far arises where a claimant seeks to reach specific property, as where a constructive trust is sought to be impressed upon funds in the hands of a receiver,¹⁴ or certain assets are alleged to have been lawfully attached.¹⁵ In this case, since the claimant is not seeking recognition of a valid claim against the assets of the corporation as a whole, but reimbursement out of a particular fund, the court having custody of that fund is the only one which can properly determine whether such priority should be accorded.¹⁶

After an ordinary claim has been submitted and "allowed" in one jurisdiction it is often desirable, as has been seen, that it be filed in another jurisdiction.¹⁷ Is the "allowance" of the claim by one court conclusive proof of its validity, so as to make mandatory its "allowance" by another court exercising jurisdiction over other property of the same corporation? Although there is no case in receivership proceedings directly involving this problem, there are *dicta* indicating that such recognition will not be given to the "allowance" of a claim by another court.¹⁸ A proper answer necessitates an inquiry into the nature of a receivership proceeding. A receivership has been said to be a proceeding *in rem*¹⁹ which has for its *res* the property in the custody of the court. A claimant is, therefore, merely asking the court to recognize his right to share in the distribution of the corporate assets located in that jurisdiction. An adjudication by one court of such right of participation in the assets in its custody would have no relationship to the right of the same petitioner to share in the distribution of entirely different assets placed under the custody of an entirely independent court. In the analogous field of decedents' estates this view has been adopted by some of the courts²⁰ while others²¹ have held that the "allowance" of a claim is a

" . . . judgment . . . against the person of the administrator that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. A judgment . . . cannot have effect . . . on lands in an-

nental Oil Co. v. American Co-operative Ass'n, 31 Wyo. 433, 228 Pac. 503 (1924). But *cf.* Morlan v. Lucey Mfg. Corp., 7 F. (2d) 494 (S. D. Cal. 1925). To the effect that filing proof of claim in receivership proceedings is no bar to attachment proceedings in a state where no receiver has been appointed, see Zacher v. Fidelity Trust & Safety-Vault Co., 106 Fed. 593 (C. C. A. 6th, 1901).

¹³ *Supra* note 7 and *infra* note 52.

¹⁴ Beaver Boards Co. v. Imbrie & Co., 282 Fed. 654 (N. D. Ga. 1922).

¹⁵ Fletcher v. Harney Peak Tin-Mining Co., 84 Fed. 555 (C. C. S. D. N. Y. 1897); Cohen v. Gold Creek, Nevada, Mining Co., 95 Fed. 580 (C. C. D. Nev. 1899); Smith v. Electric Machinery Co., 83 Pa. Super. 143 (1924).

¹⁶ 16 FLETCHER, *op. cit.* *supra* note 1, at 620.

¹⁷ *Supra* note 11.

¹⁸ Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773 (1890); see Whelan v. Enterprise Transportation Co., *supra* note 4, at 139; Clark v. Painted Post Lumber Co., *supra* note 5, at 415, 104 Atl. at 731; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) Proposed Final Draft No. 5, § 2080A. But see Mitchell v. Liberty Clay Products Co., *supra* note 11, at 288, 139 Atl. at 854.

¹⁹ 16 FLETCHER, *op. cit.* *supra* note 1, at 620.

²⁰ Wilson v. Hartford Fire Ins. Co., *supra* note 7.

²¹ Creswell v. Slack, 68 Iowa 110, 26 N. W. 42 (1885); Goodall v. Marshall, 11 N. H. 88 (1840).

other State by virtue of the faith and credit given to it by the Constitution and act of Congress. The law and courts of a State can only affect persons and things within its jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment and operate by way of estoppel."²²

Whichever view is adopted when this problem is presented to the courts in the field of equity receiverships, the "allowance" by one court is not *res adjudicata* when presented to another court. It may be observed further that while a judgment at law may be obtained against an administrator, the appointment of a receiver is usually accompanied by a restraining order making it impossible to obtain a judgment.²³

However, as the very nature of a receivership makes it imperative that the various courts work in harmony, one court will, on the basis of comity, accord recognition of the claims "allowed" in another jurisdiction.²⁴ Despite the almost universal recognition of another court's "allowance", the conditions imposed upon remitting²⁵ the funds collected by the ancillary receiver to the primary court reveal the inherent fear that the claims presented only in the ancillary court and "allowed" there only will not be honored upon final distribution.²⁶

After the petitions have been filed in the various jurisdictions and proofs of claim have been "allowed" it is sometimes contended by claimants residing in a particular locality that they should be preferred upon distribution of the corporate assets located in their jurisdiction over claimants residing elsewhere,²⁷ and that their claims be paid in full before non-resident claimants be permitted to share at all.²⁸ In some instances local statutes have provided for such a preference.²⁹ In *Blake v. McClung* the United States Supreme Court held that "such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States".³⁰

This is applicable only to non-resident *natural* persons as it is settled that the protection afforded by the "privileges and immunities" clause³¹ does not apply to foreign corporations not licensed to do business in the state, on the ground that

²² *Stacy v. Thrasher*, 47 U. S. 44, 60 (1848). For a comparison of the two theories see *Richards v. Blaisdell*, 12 Cal. App. 101, 111, 106 Pac. 732, 737 (1909).

²³ 16 FLETCHER, *op. cit.* *supra* note 1, at 314.

²⁴ See dissenting opinion of Parker, C. J., in *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 498, 55 N. E. 1053, 1055 (1900).

²⁵ *Infra* notes 50, 53, and 54.

²⁶ See *Buswell v. Supreme Sitting of Order of Iron Hall*, 161 Mass. 224, 36 N. E. 1065 (1894); *Clark v. Painted Post Lumber Co.*, *supra* note 5, at 415, 104 Atl. at 731; *Engineering Co. v. Perryman Electric Co.*, 166 Atl. 461, 462 (N. J. Ch. 1933). See generally *infra* note 47.

²⁷ *Smith v. Taggart*, 87 Fed. 94 (C. C. C. A. 8th, 1898); *Security Savings & Loan Ass'n v. Moore*, 150 Ind. 688, 50 N. E. 869 (1898); *Weedon v. Granite State Provident Ass'n*, 109 Ky. 504, 59 S. W. 758 (1900); *Day v. Postal Telegraph Co. of Baltimore*, 66 Md. 354, 7 Atl. 608 (1887); *Ware v. Supreme Sitting of Order of Iron Hall*, 28 Atl. 1041 (N. J. Ch. 1894); *Frowert v. Blank*, 204 Pa. 368, 54 Atl. 1000 (1903).

²⁸ *Maynard v. Granite State Provident Ass'n*, 92 Fed. 435 (C. C. A. 6th, 1899); *MacMurray v. Sidwell*, *supra* note 5; *Thornley v. J. C. Walsh Co.*, *supra* note 6.

²⁹ TENN. ANN. CODE (Shannon, 1932) § 4134. For a good discussion of the power of a state to prefer local creditors, see Note (1929) 77 U. OF PA. L. REV. 1001.

³⁰ 172 U. S. 239, 254, 19 Sup. Ct. 165, 171 (1898); see Note (1929) 77 U. OF PA. L. REV. 1001, 1006; *Maynard v. Granite State Provident Ass'n*, *supra* note 28; *Wilson v. Keels*, 54 S. C. 545, 32 S. E. 702 (1899); *Brunner v. York Bridge Co.*, 78 W. Va. 702, 90 S. E. 233 (1916).

³¹ U. S. CONSTITUTION, Article IV, Sec. 2 (1).

a corporation is not a "citizen" within the meaning of that provision.³² Nor is the corporation deprived of "due process" since no *property* right is denied the claimant corporation, the corporation in receivership being admittedly indebted to the claimant; the latter is denied merely the right to participate upon terms of equality with local claimants.³³ Nor does such a preference contravene the "equal protection" clause,³⁴ since the foreign corporation is not "within its jurisdiction."³⁵ Furthermore, even if a foreign corporation is licensed to do business in the state and so is "within its jurisdiction", it will be subordinated to resident *natural* persons and domestic corporations upon the theory that the claimant when applying for permission to do business in the state consented to the provisions of the statute.³⁶ The almost axiomatic statement that all claimants of like class should share equally and ratably upon the distribution of the fund realized from the sale of the corporate assets,³⁷ makes it unfortunate that the phraseology of the federal Constitution permits an unfair discrimination in receivership assets should a state desire to be partial to its residents to the detriment of foreign corporations.

It should be noted that, with respect to non-resident aliens or alien corporations which have presented claims in receivership proceedings instituted in this country, there may be discrimination in favor of American citizens or American corporations, as the federal Constitution affords the former no protection.³⁸ However, on the basis of comity and the equitable principle that all claimants should share equally, alien claimants are generally accorded equality upon distribution.³⁹

The above situation should be distinguished from that which arises when a corporation, as a condition for entering a state in order to do business therein, is required by statute to deposit a certain sum for the benefit of claimants resident in that state.⁴⁰ It has generally been held, upon the distribution of such a deposit that resident claimants may be preferred over non-resident *natural* persons as

³² See *Blake v. McClung*, *supra* note 30, at 259, 19 Sup. Ct. at 173. As to local creditors being preferred over foreign corporations under a priority statute in bankruptcy proceedings, see *In re Standard Oak Veneer Co.*, 173 Fed. 103 (E. D. Tenn. 1909); *In re Boggs-Rice Co.*, 66 F. (2d) 855 (C. C. A. 4th, 1933).

³³ See *Blake v. McClung*, *supra* note 30, at 260, 19 Sup. Ct. at 173; Note (1929) 77 U. OF PA. L. REV. 1001, 1008.

³⁴ U. S. CONSTITUTION, Amend. XIV, Sec. 1.

³⁵ See *Blake v. McClung*, *supra* note 30, at 261, 19 Sup. Ct. at 174; Note (1929) 77 U. OF PA. L. REV. 1001, 1008.

³⁶ But see *Home Insurance Co. v. Morse*, 87 U. S. 445 (1874) (foreign corporation consented, as a condition of entrance into the state to do business therein, that it would not remove any litigation to the federal courts), where it was held that a state could not impose conditions repugnant to the federal Constitution.

³⁷ *Fry v. Charter Oak Life Ins. Co.*, 31 Fed. 197, 200 (C. C. E. D. Mo. 1887); *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305 (C. C. S. D. Iowa 1887); see *Maynard v. Granite State Provident Ass'n*, *supra* note 28; *Wilson v. Keels*; *Brunner v. York Bridge Co.*, both *supra* note 30; *In re People (City Equitable Fire Ins. Co., Ltd.)*, 238 N. Y. 147, 157, 144 N. E. 484, 487 (1924).

³⁸ That the federal Constitution is no protection for the alien, see *Burnet v. Brooks*, 288 U. S. 378, 53 Sup. Ct. 457 (1933) (inheritance tax imposed upon securities owned by an alien and situated in New York), Notes (1933) 47 HARV. L. REV. 307; (1933) 42 YALE L. J. 1277.

³⁹ *Cf. In re People (City Equitable Fire Ins. Co.)*, *supra* note 37; *Matter of People (Norske Lloyd Ins. Co.)*, *supra* note 4.

⁴⁰ N. C. CODE ANN. (Michie, 1931) § 6411 (2); N. Y. INS. LAW (1909) § 27; TEX. REV. CIVIL CODE (Vernon, 1928) art. 4759; VA. CODE ANN. (Michie, 1930) § 4211. For a compilation of decisions on the various statutes, see 1 COUCH, CYCLOPEDIA INSURANCE LAW (1929) § 245a, n. 5.

well as over foreign corporations.⁴¹ The reason for such a holding is that the money is looked upon as a trust fund set up at the time of the deposit for the benefit of the local claimants, for, as is stated in *People v. Granite State Provident Association*,⁴²

" . . . It [the deposit] is in the nature of a fund held in trust for the benefit of domestic creditors and shareholders of the defendant. The deposit was made . . . as a condition of the defendant's right to transact business here. The defendant corporation, in making the deposit, must be deemed to have consented that in case of insolvency the fund might be distributed according to the terms of the statute; that is to say, to creditors and shareholders residing in this state. So that by the act of the corporation itself, in availing itself of the benefits of the statute, it has devoted this fund to the benefit of the domestic creditors and shareholders, at least so far as to enable them to receive payment upon all their obligations in full. Therefore, the application of the fund to their benefit in the first instance does not infringe upon the provision of the federal constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

After the "trust fund" is distributed to the local claimants if the deposit was insufficient to satisfy their claims in full, it is usually contended, when they appear in the primary jurisdiction, that the amount they have received from the "trust fund" should not be deducted in determining the amount of their claims on the remaining corporate assets.⁴³ This contention has been repudiated,⁴⁴ for although the local claimants were preferred as to such "trust fund" in the ancillary jurisdiction,⁴⁵ when they appear in the primary court, they are placed upon an equal footing with all other like claimants and their entire share cannot be larger than the share obtained by other claimants of the same class.⁴⁶ Therefore, the primary receiver, in computing the share of the funds in his hands that such claimant will receive, must deduct the amount received from all other sources.

After the corporate assets located in the various ancillary jurisdictions have been converted into cash, the primary receiver usually asks that the converted

⁴¹ *Phillips v. Perue*, 111 Tex. 112, 129 S. W. 849 (1921), the preference in the above case being approved in *In re Phillips* (Casualty Company of America), *supra* note 10; *Lewis v. American Savings & Loan Ass'n*, 98 Wis. 203, 73 N. W. 793 (1898), *aff'd, sub nom. Hale v. Lewis*, 181 U. S. 473, 21 Sup. Ct. 677 (1901). *Contra*: *Irwin v. Granite State Provident Ass'n*, 56 N. J. Eq. 244, 38 Atl. 680 (1897), where the local creditors were permitted to receive only their *pro rata* share out of the special deposit. For a criticism of the procedure in the Hale case, see *Clarke v. Darr*, 168 Ind. 101, 80 N. E. 19 (1907); see also *Blake v. McClung*, *supra* note 30.

⁴² 161 N. Y. 492, 496, 55 N. E. 1053, 1055 (1900). See CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) Proposed Final Draft No. 5, § 2062, Comment c.

⁴³ *Cowen v. Failey*, *supra* note 10; see *People v. Granite State Provident Ass'n*, *supra* note 24, where the ancillary court refused to remit the general funds in its custody unless the primary court would file a bond that local claimants would not have deducted from their *pro rata* share to be received in the primary court the amount received from the special deposit in the ancillary court.

⁴⁴ *Cowen v. Failey*, *supra* note 10; *Bank Commissioners v. Granite State Provident Ass'n*, 70 N. H. 557, 49 Atl. 124 (1901). In the latter case the primary court refused to file a bond that the claimants residing in an ancillary jurisdiction would not have deducted from their *pro rata* share to be received in the primary court the amount received from the special deposit.

⁴⁵ *Supra* note 39.

⁴⁶ See argument of court in *Bank Commissioners v. Granite State Provident Ass'n*, *supra* note 44, at 561, 49 Atl. at 126. CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) Proposed Final Draft No. 5, §§ 2067, 2068.

assets be turned over to him for final distribution. As the local funds are completely within the control of each ancillary court, it is discretionary⁴⁷ whether the fund shall be remitted or be distributed by each receiver in an independent proceeding. Inasmuch as the majority of claimants will have presented their proofs of claim in the primary jurisdiction and most of the assets will be located there, expediency and economy recommend that the ancillary funds be remitted. In most instances the advantages of a central distribution are appreciated, and the funds are turned over. Although remittance is discretionary, it has been held that an arbitrary retention will not be permitted.⁴⁸

The desirability of remitting the various funds to the primary receiver to obtain a single, speedy and centralized distribution is somewhat offset by the fear of the ancillary court that claimants whose petitions were allowed only by the ancillary receiver will be required to prove their claims anew in the primary court,⁴⁹ or that the creditors residing in the primary jurisdiction will be preferred upon the final distribution.⁵⁰ As an important duty of the ancillary court is the protection of claimants residing in its jurisdiction,⁵¹ various methods have been devised to insure a proportional and equitable distribution among all claimants. If the funds collected by the ancillary receiver are sufficient to enable the local creditors to receive their full *pro rata* share based upon a marshalling of the assets located everywhere, their proportionate share may be retained and merely the balance remitted.⁵² In this case, non-resident claimants who have presented their petition in the ancillary court may likewise receive their full *pro rata* share should there be sufficient funds to permit this.⁵³ But should the fund enable only local claimants to receive their proper share, the non-resident claimants must look elsewhere for their balance.

In a few instances it has been held that even the surplus, after the payment of all claimants who have presented their claims in the ancillary court, should not be remitted but that the entirety should be distributed by the ancillary receiver.⁵⁴ Such procedure should be followed only when there is substantial reason for such a course as, for example, where distribution will be more quickly and efficiently done by the ancillary receiver than by the primary receiver.

Another method frequently employed to insure recognition of local creditors and locally approved claims in the primary proceedings is to remit only upon the express condition that the primary receiver will agree that all claims which have

⁴⁷ *Sands v. E. S. Greeley & Co.*, 88 Fed. 130 (C. C. A. 2d, 1898); *Drury v. Doherty*, 127 Misc. 263, 215 N. Y. Supp. 613 (1926); see *Barley v. Gittings*, *supra* note 6, at 445; *Brunner v. York Bridge Co.*, *supra* note 30, at 707, 90 S. E. at 235. 1 CLARK, *op. cit. supra* note 11, § 321; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1934) Proposed Final Draft No. 5, § 2061. On the general subject of remittance of assets see Comment (1932) 41 YALE L. J. 757. As to the discretion of the ancillary court to adjudicate proofs of claim at all or leave that problem to the primary court, see *supra* note 3; *Pfahler v. McCrum-Howell Co.*, *supra* note 4, at 685.

⁴⁸ *Southern B. & L. Ass'n v. Miller*, 118 Fed. 369 (C. C. A. 4th, 1902).

⁴⁹ *Cf. Buswell v. Supreme Sitting of Order of Iron Hall*, *supra* note 26; *Clark v. Painted Post Lumber Co.*, *supra* note 5; *Irwin v. Granite State Provident Ass'n*, *supra* note 41; *Drury v. Doherty*, *supra* note 10.

⁵⁰ *Maynard v. Granite State Provident Ass'n*, *supra* note 28; *People v. Granite State Provident Ass'n*, *supra* note 24; *Drury v. Doherty*, *supra* note 47; see *Baldwin v. Circuit Judge*, 101 Mich. 119, 134, 59 N. W. 432, 437.

⁵¹ See *Baldwin v. Circuit Judge*, *supra* note 50, at 134, 59 N. W. at 437; 1 SMITH, RECEIVERS (Tardy's ed. 1920) 977.

⁵² *Brown & Co. v. Tishomingo Banking Co.*, 200 Ala. 613, 76 So. 971 (1917); *Matter of People (Norske Lloyd Ins. Co.)*, *supra* note 4; see *Brooks v. Smith*, *supra* note 4, at 38; *Irwin v. Granite State Provident Ass'n*, *supra* note 41, at 250, 38 Atl. at 683; *Brunner v. York Bridge Co.*, *supra* note 30, at 707, 76 So. at 971.

⁵³ See *Barley v. Gittings*, *supra* note 6, at 446.

⁵⁴ *Drury v. Doherty*, *supra* note 47.

been "allowed" in the ancillary court will likewise be "allowed" in the primary court.⁵⁵ As the primary receiver usually is eager to obtain the funds, there is generally a prompt acquiescence to any conditions placed upon the remittance.

Sometimes the ancillary court requires, as a prerequisite to remittance, the filing of a bond by the primary receiver insuring recognition and equality in the primary jurisdiction for claimants whose proofs of claim have been acknowledged by the ancillary court.⁵⁶ Usually the primary receiver will agree to any such terms, but if the ancillary court imposes conditions which are too harsh, the primary receiver will decline to sign the bond,⁵⁷ with the result that the ancillary court will itself make distribution.

Recapitulation

Claimants, no matter where they reside, can present their proofs of claim in any jurisdiction where receivership proceedings have been instituted; but the allowance or disallowance of a claim in one jurisdiction does not affect its validity in any other. Natural persons who have proved their claims in a court where a receiver has been appointed are entitled, as of right under the federal Constitution, to share *pro rata* in any application of the unincumbered assets in the hands of the local receiver to the payment of claims. Corporate claimants, although not entitled as of right under the federal Constitution to share proportionally with resident natural persons or domestic corporations are, on the basis of comity and of Equity's desire for impartiality, generally accorded equality. Also, it is discretionary with the ancillary court whether the fund which has been collected by its receiver should be remitted to the primary jurisdiction, and remittance may be conditioned on such reasonable terms as will insure local claimants recognition and equality in the primary court.

S. F.

⁵⁵ *Buswell v. Supreme Sitting of Order of Iron Hall*, *supra* note 26; *Drury v. Doherty*, *supra* note 10; see *MacMurray v. Sidwell*, *supra* note 5, at 565, 58 N. E. at 724. Sometimes the fund is remitted unconditionally. *Parsons v. Charter Oak Life Insurance Co.*, *supra* note 37; *Superior Cabinet Corp. v. American Piano Co.*, *supra* note 3; see dissent in *People v. Granite State Provident Ass'n*, *supra* note 24, at 498, 55 N. E. at 1055.

⁵⁶ *Maynard v. Granite State Provident Ass'n*, *supra* note 28; *Clark v. Painted Post Lumber Co.*, *supra* note 5; *Engineering Co. v. Perryman Electric Co.*, *supra* note 26; *People v. Granite State Provident Ass'n*, *supra* note 24.

⁵⁷ *Bank Commissioners v. Granite State Provident Ass'n*, *supra* note 44.